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#### Recommended Citation

Bryan Adamson, *The Homeowners' Illusory Safety Net: Mortgage Broker Surety Liability*, 47 GONZ. L. REV. 165 (2012).

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# The Homeowners' Illusory Safety Net: Mortgage Broker Surety Liability

Bryan Adamson\*

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## INTRODUCTION

Scenario: A Washington consumer realizes her dream of homeownership. Through the aid of a mortgage broker, she secures a loan to purchase a \$215,000 home. On April 15, 2006, she signs all of the essential basic forms:

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the purchase and sale agreement, the Deed of Trust, the Promissory Note, the Truth-in-Lending disclosure statements, and the settlement statement. One year later, she decides to refinance in order to take advantage of a better interest rate.

During the refinancing process, her bank's loan officer, reviewing her original mortgage closing documents, tells her of numerous problems in her initial transaction. Most notably, it appears that her home value was inflated by \$60,000 based on an appraisal the bank performed in the refinancing process. A second, \$15,000 loan obtained for needed home repairs, upon purchase, did not include required notice of her rescission rights. Nor did her settlement documents include notices of servicing and loan transfer. Her original broker received substantial fees and commissions from the lender for the transaction: a \$4314 yield spread premium; a \$575 mortgage broker fee; a \$500 application fee; and a \$595 processing fee. The appraiser—hired by the broker—received \$750. A third-party company—eventually revealed to be a shell company of the mortgage broker principals—received \$34,000 of the loan proceeds. The transaction was also rife with junk fees (e.g., \$90 for a document delivered by Federal Express, and \$75 for a credit report).<sup>1</sup>

The next day she contacts an attorney, and on May 1, a lawsuit is filed on her behalf, naming her original mortgage company, its principals, the individual agents, the shell company, and the mortgage company's surety. The mortgage company is now insolvent and the principals, brokers, and agents are nowhere to be found. The suit proceeds against the surety company, which moves for dismissal from the lawsuit based on a statute of limitations defense. The surety's defense is successful. The homeowner is now left to seek recovery against an insolvent mortgage company.

Just over one year after the transaction, why is it that the homeowner cannot look to the surety for remedy? Under Washington state and common law, the homeowner's suit against the principal wrongdoers was timely.<sup>2</sup> However, under Washington's Mortgage Brokers Practices Act ("MBPA"), a consumer must bring an action against the broker's *surety* "not later than *one* year after the alleged violation . . . ."<sup>3</sup>

Washington's mortgage broker surety liability provision is both practically and procedurally absurd. First, the idea of bringing suit against the surety

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1. This scenario is taken directly from a case the author litigated with his students in Seattle University's Predatory Lending Clinic. *See* *Larry v. Hartford Fire Ins. Co.*, No. 62444-0-I, 2009 WL 1546606 (Wash. Ct. App. June 1, 2009).

2. Washington common law and other statutory of limitations provisions allow plaintiffs to bring actions against mortgage brokers and related third parties within, at a minimum, three years of the acts or omissions giving rise to the injury. *See* WASH. REV. CODE §§ 4.16.005-.080 (2010); *infra* notes 47-52 and accompanying text.

3. WASH. REV. CODE § 19.146.240(2)(a) (2010) (emphasis added).

*before* one must bring an action against the principal is counterintuitive. Second, the provision creates a perverse incentive to compel the consumer to rush to the courthouse—exposing them to potential sanctions for frivolous or premature suits.<sup>4</sup> Third, it subverts all state and federal statutes of limitations provisions otherwise applicable to mortgage brokers.<sup>5</sup> Finally, given the volume and complexity of mortgage documents, it is unreasonable to expect the average consumer to become aware of any harm within a year. Given the mortgage industry's decimation<sup>6</sup> and the prevalence of mortgage broker fraud and deceit,<sup>7</sup> the brokers' surety bond is an important resort for the wronged consumer. While purporting to require a surety bond or other mechanism to guarantee protections to Washington consumers, the provision, in fact, does nothing but compel the consumer to look to the broker, with no guarantee that the consumer will be able to recover from that broker. Washington's mortgage broker surety liability provision thus flies in the face of consumer protection policy.

This article exposes the absurdity of Washington's one-year statute of limitations against mortgage broker sureties. Part I examines Washington's regulation of mortgage brokers and its surety requirements, demonstrating how

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4. See generally WASH. SUPER. CT. CIV. R. 11(a), the relevant parts of which provide as follows:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

*Id.*

5. Compare WASH. REV. CODE § 19.146.240(2)(a) (providing that actions must be filed within, at a maximum, one year of the violation), with 12 U.S.C. § 2614 (2006) (providing a three-year statute of limitations in some instances).

6. See *infra* notes 149-156 and accompanying text; see also *Foreclosures*, N.Y. TIMES, June 27, 2011, <http://topics.nytimes.com/top/reference/timestopics/subjects/f/foreclosures/index.html?scp=2&sq=mortgage%20fraud&st=cse>.

7. See *infra* notes 141-148 and accompanying text; see also Charlie Savage, *Government Crackdown on Mortgage Fraud*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/business/20mortgage.html?scp=10&sq=mortgage%20fraud&st=Search>.

the state's mortgage broker surety liability one-year statute of limitations provision is in direct conflict with state and federal laws. Part II explores the important role mortgage surety bonds play in enhancing consumer protections, especially in light of the seismic changes in the mortgage broker industry recounted in Part III. Part IV demonstrates how Washington consumers have no quarter under statutory or common law to defeat the explicit one-year statute of limitations provision. Part V answers whether federal laws covering mortgage brokers, such as the Secure and Fair Enforcement of Mortgage Licensing Act,<sup>8</sup> preempt Washington's mortgage broker surety statute of limitations provision. In closing, this article proposes that federal or state legislation correct the liability gap between mortgage brokers and surety liability.

### I. WASHINGTON'S MBPA AND SURETY PROVISION

Washington has enacted a prototypical statute regulating mortgage brokers<sup>9</sup> conducting business in the state. The purpose of the MBPA is "to establish a state system of licensure in addition to rules of practice and conduct of mortgage brokers and loan originators to promote honesty and fair dealing with citizens and to preserve public confidence in the lending and real estate community."<sup>10</sup> The MBPA is therefore designed to ensure that solicitations,

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8. 12 U.S.C. §§ 5101-5116 (Supp. IV 2010).

9. At the outset, it is useful to note the distinction between a "mortgage broker" and a "mortgage banker." A mortgage banker "originates real-estate loans for a fee, resells them to other parties, and services the monthly payments." BLACK'S LAW DICTIONARY 1104 (9th ed. 2009). By contrast, a mortgage broker "markets mortgage loans and brings lenders and borrowers together," but "does not originate or service mortgage loans." *Id.* at 220. Mortgage bankers have deeper historical roots than mortgage brokers. See Nancy Funkhouser, Note, *Reining in on Mortgage Brokers: The Need to Enforce Existing Regulations*, 64 U. MIAMI L. REV. 1145, 1147-48 (2010). Mortgage bankers are typically direct agents of, and work within, particular commercial banks and other lending institutions. See *id.* Mortgage brokers, however, are best thought of as intermediaries who match potential borrowers with lenders, and facilitate the lending process. See *id.* Further, while mortgage bankers typically sell their own products, mortgage brokers receive loan products from several, often competing sources—commercial banks, hard-money lenders, or warehouse lenders, for example. See *id.* Both bankers and brokers are considered "loan originators" under state laws defining those terms. See, e.g., WASH. REV. CODE § 19.146.010(11)(a)-(b), (13) (2010).

10. WASH. REV. CODE § 19.146.005 (2010). In enacting the Mortgage Broker Practices Act, the Washington State Legislature also articulated its findings as follows:

The legislature finds and declares that the brokering of residential real estate loans substantially affects the public interest, requiring that all actions in mortgage brokering be actuated by good faith, and that mortgage brokers, designated brokers, loan originators, and other persons subject to this chapter abstain from deception, and practice honesty and equity in all matters relating to their profession. The

processes, and outcomes on behalf of consumers are performed in a manner that guards against deception, misrepresentation, or fraud in the provision of residential financial products.<sup>11</sup> The MBPA also requires mortgage brokers to obtain a surety bond as a precondition to being licensed<sup>12</sup>—ostensibly an added layer of consumer protection.

#### A. *Washington's Mortgage Brokers Practices Act*

The MBPA is the primary legislative directive regulating mortgage brokers conducting business in Washington.<sup>13</sup> The MBPA requires written disclosure

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practices of mortgage brokers and loan originators have had significant impact on the citizens of the state and the banking and real estate industries.

*Id.*

11. WASH. REV. CODE § 19.146.020(1)(a)-(b) (2010). The MBPA specifically exempts the following:

(a) Any person doing business under the laws of the state of Washington or the United States, and any federally insured depository institution doing business under the laws of any other state, relating to commercial banks, bank holding companies, savings banks, trust companies, savings and loan associations, credit unions, insurance companies, or real estate investment trusts as defined in 26 U.S.C. Sec. 856 [(regulated investment companies and real estate investment trusts)] and the affiliates, subsidiaries, and service corporations thereof;

(b) Any person doing business under the consumer loan act is exempt from this chapter only for that business conducted under the authority and coverage of the consumer loan act . . . .

*Id.*

12. WASH. REV. CODE § 19.146.205(6)(a) (2010) (“[E]ach applicant for a mortgage broker’s license shall file and maintain a surety bond, in an amount which the director deems adequate to protect the public interest, executed by the applicant as obligor and by a surety company authorized to do a surety business in this state as surety.”). This statute also allows a broker, as a licensing condition, to submit an alternative form of guaranty. *See id.* § 19.146.205(6)(b); *see also* WASH. ADMIN. CODE § 208-620-010 (2009) (defining a “bond substitute” as “unimpaired capital, surplus, and qualified long-term subordinated debt”).

13. WASH. REV. CODE §§ 19.146.005-.905 (2010). The MBPA defines a “mortgage broker” as

any person who for compensation or gain, or in the expectation of compensation or gain (a) assists a person in obtaining or applying to obtain a residential mortgage loan or (b) holds himself or herself out as being able to assist a person in obtaining or applying to obtain a residential mortgage loan.

*Id.* § 19.146.010(14). The MBPA also applies to loan originators. *Id.* A “loan originator” is defined as

a natural person who for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain (i) takes a residential mortgage loan application for a mortgage broker, or (ii) offers or negotiates terms of a mortgage loan. ‘Loan originator’ also includes a person who holds themselves out to the public as able to perform any of these activities. ‘Loan originator’ does not mean persons performing purely administrative or clerical tasks for a mortgage broker.

of mortgage fees and costs,<sup>14</sup> mandates execution of all broker-borrower contracts in writing,<sup>15</sup> and imposes fiduciary obligations upon mortgage brokers.<sup>16</sup> The MBPA also prohibits false advertising,<sup>17</sup> fraud<sup>18</sup> or misrepresentation regarding fees or commissions,<sup>19</sup> interest rates, points or other financing terms,<sup>20</sup> self-dealing,<sup>21</sup> willful or knowing omissions of material facts,<sup>22</sup> and unfair or deceptive practices or acts in general.<sup>23</sup> In proscribing unfair or deceptive practices or acts, the MPBA explicitly incorporates Washington's Consumer Protection Act ("CPA"),<sup>24</sup> making violations of the MPBA *per se* violations of the CPA.<sup>25</sup>

Concurrently, the MBPA demands compliance with several federal statutes and regulations.<sup>26</sup> Through the MBPA, brokers are to comply with the Truth in Lending Act ("TILA"),<sup>27</sup> the Real Estate Settlement Procedures Act of 1974 ("RESPA"),<sup>28</sup> the Gramm-Leach-Bliley Act,<sup>29</sup> Federal Trade Commission privacy rules,<sup>30</sup> the Equal Credit Opportunity Act ("ECOA"),<sup>31</sup> the Home Mortgage Disclosure Act<sup>32</sup> and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TFA").<sup>33</sup> Importantly, violations of these federal laws also constitute *per se* violations of the MBPA.<sup>34</sup>

*Id.* § 19.146.010(11)(a).

14. WASH. REV. CODE § 19.146.030(1).

15. *Id.* § 19.146.040(1).

16. *Id.* § 19.146.095(1).

17. *Id.* § 19.146.0201(5), (10).

18. *Id.* § 19.146.0201(1), (3).

19. *Id.* § 19.146.0201(4).

20. *Id.* § 19.146.0201(5).

21. *Id.* § 19.146.103(1).

22. *Id.* § 19.146.0201(8).

23. *Id.* § 19.146.0201(2).

24. WASH. REV. CODE §§ 19.86.010-.920 (2010).

25. WASH. REV. CODE § 19.146.100.

26. *Id.* § 19.146.0201(11).

27. 15 U.S.C. §§ 1601-1693r (2006 & Supp. IV 2010); Regulation Z, 12 C.F.R. pt. 226 (2011).

28. 12 U.S.C. §§ 2601-2617 (2006 & Supp. IV 2010); Regulation X, 24 C.F.R. pt. 3500 (2011).

29. 15 U.S.C. §§ 6801-6809 (2006 & Supp. IV 2010).

30. 16 C.F.R. pts. 313-314 (2011).

31. 15 U.S.C. §§ 1691-1691f; Regulation B, 12 C.F.R. pt. 202 (2011).

32. 12 U.S.C. §§ 2801-2810 (2006 & Supp. IV 2010); Regulation C, 12 C.F.R. pt. 203 (2011).

33. 15 U.S.C. §§ 6101-6108 (2006 & Supp. IV 2010).

34. WASH. REV. CODE § 19.146.0201(11) (2010). The statute provides that no mortgage broker shall

[f]ail to comply with any requirement of the truth-in-lending act, 15 U.S.C. Sec. 1601 and Regulation Z, 12 C.F.R. Sec. 226; the real estate settlement procedures

*B. Washington's Mortgage Broker Surety Requirements*

"[T]o protect the public interest," Washington State requires mortgage brokers to obtain and maintain a surety bond.<sup>35</sup> The bond must be an amount between \$20,000 and \$60,000.<sup>36</sup> After a year of existence, the bond amount becomes contingent upon the volume of business conducted the previous year.<sup>37</sup> The bond runs to the State as obligee, but also to the benefit of "any person or persons who suffer loss by reason of the applicant's or its loan

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act, 12 U.S.C. Sec. 2601 and Regulation X, 24 C.F.R. Sec. 3500 the equal credit opportunity act, 15 U.S.C. Sec. 1691 and Regulation B, Sec. 202.9, 202.11, and 202.12; Title V, Subtitle A of the financial modernization act of 1999 (known as the "Gramm-Leach-Bliley act"), 12 U.S.C. Secs. 6801-6809; the federal trade commission's privacy rules, 16 C.F.R. Parts 313-314, mandated by the Gramm-Leach-Bliley act; the home mortgage disclosure act, 12 U.S.C. Sec. 2801 et seq. and Regulation C, home mortgage disclosure; the federal trade commission act, 12 C.F.R. Part 203, 15 U.S.C. Sec. 45(a); the telemarketing and consumer fraud and abuse act, 15 U.S.C. Secs. 6101 to 6108; and the federal trade commission telephone sales rule, 16 C.F.R. Part 310, as these acts existed on January 1, 2007, or such subsequent date as may be provided by the department by rule, in any advertising of residential mortgage loans, or any other applicable mortgage broker or loan originator activities covered by the acts. The department may adopt by rule requirements that mortgage brokers and loan originators comply with other applicable federal statutes and regulations in any advertising of residential mortgage loans, or any other mortgage broker or loan originator activity . . . .

*Id.* Of the federal laws incorporated into Washington's MPBA, this article focuses only on those that allow claims to be brought beyond one year. Thus, this article does not address all federal laws incorporated into Washington's MBPA, namely, the Gramm-Leach-Bliley Act, the Home Mortgage Disclosure Act, and Federal Trade Commission privacy laws. It should also be noted that while the Home Mortgage Disclosures Act does not provide for a private right of action, violations of that Act may constitute violations of other federal statutes that do provide a private right of action. *See* 12 U.S.C. § 2804(c) (providing that violations of 12 U.S.C. §§ 2801-2810 may be deemed violations of other provisions as well).

35. WASH. REV. CODE § 19.146.205(6)(a) (2010).

36. WASH. ADMIN. CODE § 208-660-175(1)(c), (e) (2009); *see also* WASH. REV. CODE § 19.146.205(6)(a) (empowering the director to determine what constitutes an "adequate amount").

37. WASH. REV. CODE § 19.146.205(6)(a); WASH. ADMIN. CODE § 208-660-175(1)(c). The surety bond amount is based on the "annual loan origination volume of the licensee." WASH. REV. CODE § 19.146.205(6)(a); WASH. ADMIN. CODE § 208-660-175(1)(b). Initially, the surety bond must be a minimum of \$20,000. WASH. ADMIN. CODE § 208-660-175(1)(c). On March thirty-one of each year following, the licensee must make a bond redetermination based upon the volume of business handled the previous year. *Id.* § 208-660-175(1)(c). Any mortgage broker doing more than \$40 million in loan volume must maintain a \$60,000 bond; companies doing between \$20 million and \$40 million must maintain a \$40,000 bond; those doing between \$0 and \$20 million must maintain a \$20,000 bond. *Id.* § 208-660-175(1)(e).



originator's violation" of the MBPA.<sup>38</sup> Bonds commonly obtained affirm that a surety holds itself

firmly bound unto the State of Washington in the full penal sum of [for example, between \$20,000 and \$60,000] lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.<sup>39</sup>

Such a bond will also provide:

If . . . said above bounden principal, and its mortgage brokers, employees, loan originators and independent contractors shall, upon the issuance of said license as aforesaid, faithfully conform to and abide by each and every provision of said Act and all rules lawfully made by the Director of the Department of Financial Institutions of the State of Washington thereunder, and shall reimburse all persons who suffer loss by reason of a violation of said Act or rules adopted thereunder, then this obligation to be void; otherwise to remain in full force and effect.<sup>40</sup>

As a matter of substance, this prototypical contract is drafted in the negative. It is of no effect if the mortgage broker or principal comply with the MBPA and reimburse all persons who suffer by reason of the violation.<sup>41</sup> But if the principal fails to comply with the MBPA and fails to reimburse all persons who suffer a loss by reason of the violation, the surety contract takes "full force and effect."<sup>42</sup> Therefore, the entire purpose of the contract is to benefit not just the obligee,<sup>43</sup> but third parties, i.e., "all persons" who suffer a loss by reason of a broker's MBPA violations.<sup>44</sup>

The MBPA contains an explicit statute of limitations for actions to recover from the broker's surety.<sup>45</sup> Action must be in the form of a lawsuit, and "must

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38. WASH. REV. CODE § 19.146.205(6)(a).

39. SURETY BOND TO OPERATE MORTGAGE BROKER BUSINESS WITH INDEPENDENT CONTRACTORS 1 (2006) (on file with *Gonzaga Law Review*).

40. *Id.*

41. Under the typical surety agreement, the surety binds itself to "reimburse all persons who suffer loss by reason of a violation of said Act or rules adopted thereunder . . . ." *Id.*

42. *Id.*

43. The obligee, in this case, is the mortgage broker or principal. The obligor is the entity providing the surety bond.

44. WASH. REV. CODE § 19.146.205(6)(a) (2010). The surety "shall reimburse all persons who suffer loss by reason of a violation of this chapter or rules adopted under this chapter." *Id.*

45. WASH. REV. CODE § 19.146.240(2)(a) (2010). The statute reads in part as

be brought not later than one year after the alleged violation of this chapter or rules adopted under this chapter.”<sup>46</sup>

*C. Mortgage Broker Surety Statute of Limitations Conflicts with Statutes of Limitations Provisions Against Mortgage Brokers*

Washington’s MBPA contains no statute of limitations provision for consumer grievances against mortgage brokers.<sup>47</sup> Consequently, resort must be taken in the statutes of limitations prescribed under its explicit and implicit causes of action.<sup>48</sup> Actions under Washington’s CPA, incorporated into the MBPA, must be brought within four years.<sup>49</sup> Broker-borrower contract grievances fall under Washington’s six-year statute of limitations.<sup>50</sup> Common law avenues of relief are also abundant under the MBPA: fraud, misrepresentation, negligence, unjust enrichment, conversion, breach of fiduciary duty, breach of covenants of good faith, unconscionability, infliction of emotional distress, civil conspiracy, and agency.<sup>51</sup> All claims sounding in those common law causes of action allow an aggrieved consumer *at least* three years to bring an action.<sup>52</sup> Similarly, federal laws regulating mortgage broker,

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follows:

The director or any person who is damaged by the licensee’s or its loan originator’s violation of this chapter, or rules adopted under this chapter, may bring suit upon the surety bond or approved alternative in the superior court of any county in which jurisdiction over the licensee may be obtained. Jurisdiction shall be exclusively in the superior court.

*Id.*

46. WASH. REV. CODE § 19.146.240(2)(a).

47. *See id.* §§ 19.146.005-.905.

48. *See id.* § 19.146.245 (defining MBPA violations); *id.* § 19.146.100 (deeming MBPA violations to be CPA violations as well); *see also* WASH. REV. CODE §§ 4.16.005-.080 (2010) (setting forth general limitations periods that apply in the absence of specific authority to the contrary).

49. WASH. REV. CODE §§ 19.146.100, .86.120 (2010).

50. WASH. REV. CODE §§ 4.16.005, .040(1).

51. *See, e.g.,* Larry v. Hartford Fire Ins. Co., No. 62444-0-I, 2009 WL 1546606, at \*1 n.5 (Wash. Ct. App. June 1, 2009); McCorvy v. A&B Escrow Servs., Inc., No. 61104-6-I, 2008 WL 4927367, at \*2 (Wash. Ct. App. Nov. 17, 2008); Nilsen v. Long Beach Mortg. Co., No. 56322-0-I, 2006 WL 2469141, at \*5 (Wash. Ct. App. Aug. 28, 2006); Nationscapital Mortg. Corp. v. State Dep’t of Fin. Insts., 137 P.3d 78, 83 (Wash. Ct. App. 2006).

52. *See* WASH. REV. CODE § 4.16.080(2) (providing three years for claims of negligence, conversion, infliction of emotional distress, and civil conspiracy); *id.* § 4.16.080(3) (providing three years for claims of unjust enrichment, unconscionability, and agency); *id.* § 4.16.080(4) (providing three years for claims of fraud, misrepresentation, breach of fiduciary duty, and breach of the covenant of good faith); Oreskovich v. Eymann, No. 56334-3-I, 2005 WL 2271885, at \*2 (Wash. Ct. App. Sept. 19, 2005) (applying § 4.16.080(2) to a civil conspiracy claim); Pietz v. Indermuehle, 949 P.2d 449, 453 (Wash.

mortgage financing, and disclosure conduct incorporated in the MBPA—specifically, TILA, RESPA, TFA, and ECOA—provide that certain violations may be brought up to three years after the alleged act or omission.

### 1. The Truth in Lending Act

The purpose of TILA is to enable consumers to intelligently shop for credit.<sup>53</sup> The TILA thus requires a creditor to issue the debtor a disclosure statement summarizing certain information found in the loan documents.<sup>54</sup> These disclosures are to be set forth in writing and in a particular manner.<sup>55</sup> The costs of the loan and vital information, such as the loan's annual percentage rate, finance charges, the total amount financed (including points and fees), the number of payments, and the payment schedule, are all stringently regulated by TILA.<sup>56</sup>

While some TILA violations establish a one-year statute of limitation to bring a claim,<sup>57</sup> TILA claims can be raised defensively at any time.<sup>58</sup> The TILA provides a statute of limitations of up to three years where disclosure failures give rise to a right to rescind the transaction.<sup>59</sup> Under TILA, the

Ct. App. 1998) (applying § 4.16.080(3) to a claim concerning agency); *Milligan v. Thompson*, 953 P.2d 112, 115 (Wash. Ct. App. 1998) (applying § 4.16.080(2) to emotional distress claims); *Nord v. Shoreline Sav. Ass'n*, 787 P.2d 66, 70 (Wash. Ct. App. 1990) (applying § 4.16.080(4) to a breach of fiduciary duty claim), *rev'd on other grounds*, 805 P.2d 800 (Wash. 1991).

53. 15 U.S.C. § 1601(a) (2006). The U.S. House of Representatives report accompanying TILA noted how important the use of credit has become in the United States:

Consumer credit has become an essential feature of the American way of life. It permits families with secure and growing incomes to plan ahead and to enjoy fully and promptly the ownership of automobiles and modern household appliances. It finances higher education for many who otherwise could not afford it. To families struck by serious illness or other financial setbacks, the opportunity to borrow eases the burden by spreading the payments over time.

H.R. REP. NO. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1965.

54. *See* 15 U.S.C. § 1638(a)(2)(A) (2006); 12 C.F.R. § 226.18(b) (2011).

55. *See* 15 U.S.C. § 1632(a) (2006); 12 C.F.R. § 226.17(a)(2) (2011).

56. 12 C.F.R. § 226.18(a); *see also* DIANE E. THOMPSON & ELIZABETH RENUART, NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 4.2.1, at 173 (7th ed. 2010).

57. 15 U.S.C. § 1640(e) (2006).

58. *See id.*

59. *See* 15 U.S.C. § 1635(f) (2006). The loan must be consumer credit that is "payable by agreement in more than four monthly installments" (or subject to a finance charge), and "must be a non-purchase-money security interest in the consumer's primary residence." ELIZABETH RENUART & ALYS I. COHEN, NAT'L CONSUMER LAW CTR., STOP PREDATORY LENDING § 5.9.2, at 117 (2d ed. 2007) (emphasis omitted). Under such circumstances, a borrower has the right to rescind the transaction within three business days. 15 U.S.C. § 1635(a). However, if the borrower is not given her notice of right to cancel, the

consumer has “the right to rescind the transaction until midnight of the third-business day following” the latest of two events: one, the date the credit transaction is consummated, or two, the date the consumer receives the notices required by TILA and Regulation Z pertaining to the consumer’s right to rescission.<sup>60</sup> With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) in 2010,<sup>61</sup> additional violations of TILA disclosure provisions are now subject to a three-year statute of limitations period.<sup>62</sup>

## 2. The Real Estate Settlement Procedures Act

The RESPA, passed in 1974, applies to all “federally related mortgage loan[s],” i.e., loans secured by a primary or subordinate lien on a residence where the lender is regulated or insured by the federal government.<sup>63</sup> The RESPA “was enacted to help consumers become better shoppers for settlement services.”<sup>64</sup> Like TILA, it “requires certain disclosures at various points during a loan transaction . . . .”<sup>65</sup> Good faith estimates, closing costs, and affiliate interests are all required prior to loan closings.<sup>66</sup>

Critically, borrowers are to be given what is known as a HUD-1 or HUD-1A statement, which itemizes terms such as the final loan amount, any proceed deductions resulting from payments to third parties, fees related to administration and document processing, mandatory filings, and broker payments.<sup>67</sup> Furthermore, a mortgage broker runs afoul of RESPA if he fails to tender to borrowers affirmative notice on the assignment, sale, or transfer of their mortgages.<sup>68</sup> As with TILA, RESPA claims can be raised defensively in judicial foreclosure actions, or affirmatively in an action by the homeowner to

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right to rescind extends to three years. *Id.* § 1635(f). In the opening hypothetical, because the homeowner’s second loan was for improvements, and she was not given notice of her rescission right, any TILA action based on that loan is subject to TILA’s three-year statute of limitations. 12 C.F.R. pt. 266 supp. I §§ 15(f)(1), 23(f)(3) (2011).

60. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(3).

61. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

62. *Id.* § 1414(a), 124 Stat. at 2149-50.

63. 24 C.F.R. § 3500.2(b) (2011).

64. Arielle L. Katzman, Note, *A Round Peg for a Square Hole: The Mismatch Between Subprime Borrowers and Federal Mortgage Remedies*, 31 CARDOZO L. REV. 497, 507 (2009).

65. *Id.*

66. *Id.*

67. See 24 C.F.R. pt. 3500 app. A.

68. 12 U.S.C. § 2605(b), (f) (2006).

stop a foreclosure in non-judicial foreclosure jurisdictions.<sup>69</sup> RESPA provisions regarding servicers of loans and administrators of escrow accounts allow a consumer to bring an action up to three years from the date of the violation.<sup>70</sup>

### 3. The Telemarketing and Consumer Fraud and Abuse Protection Act

The Federal Trade Commission, through the TFA, enforces rules which prohibit “deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”<sup>71</sup> Restrictions on unsolicited phone calls,<sup>72</sup> times when such calls can be made,<sup>73</sup> and affirmative disclosure requirements of the purpose and identity of the caller<sup>74</sup> are scenarios that apply with equal importance to solicitation of mortgage broker services.<sup>75</sup> The TFA allows, within three years of discovery, an action against “a person who has engaged or is engaging in such pattern or practice of telemarketing.”<sup>76</sup>

### 4. The Equal Credit Opportunity Act

The ECOA prohibits a creditor from “discriminat[ing] against a loan applicant with respect to any aspect of a credit transaction . . . .”<sup>77</sup> Further, it prohibits an arranger of credit, such as a mortgage broker, from discriminating “on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).”<sup>78</sup> The ECOA also prohibits discrimination if an applicant’s income is derived, in part, from a public assistance program, or if an applicant “in good faith” has elected to exercise any right under ECOA.<sup>79</sup> The ECOA provides a powerful tool to

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69. See JOHN RAO ET AL., NAT’L CONSUMER LAW CTR., FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 5.4, at 193 (3d ed. 2007).

70. 12 U.S.C. § 2614 (2006). Under § 2605, mortgage loan servicers and escrow administrators are bound to inform borrowers of, among other things, when their loan transfers are imminent. 12 U.S.C. § 2605(b)(2)(E).

71. 15 U.S.C. § 6102(a)(1) (2006).

72. *Id.* § 6102(a)(3)(A).

73. *Id.* § 6102(a)(3)(B).

74. *Id.* § 6102(a)(3)(C).

75. See, e.g., Fed. Trade Comm’n v. Data Med. Capital, Inc., No. SA CV 99-1266 AHS (EEx), 2010 WL 1049977, at \*26 (C.D. Cal. Jan. 15, 2010) (addressing telemarketing abuse in solicitation of mortgage modification consumers).

76. 15 U.S.C. § 6104(a) (2006).

77. 15 U.S.C. § 1691(a) (2006).

78. *Id.* § 1691(a)(1).

79. *Id.* § 1691(a)(2)-(3).

guard against discrimination in the mortgage brokering process.<sup>80</sup> In particular, ECOA allows for actual and punitive damages<sup>81</sup> against “[a]ny creditor who fails to comply with any [ECOA] requirement”<sup>82</sup> and permits such actions to be brought up to two years after a violation’s occurrence.<sup>83</sup>

These federal statutes and regulations provide a critical overlay for state mortgage broker laws. Collectively, they also proscribe fraud and misrepresentation, deceptive practices and acts, onerous contract provisions, unfair dealing, false advertising, and the like.<sup>84</sup> But in contradiction to Washington’s mortgage broker surety statute of limitations provision, the RESPA, TILA, ECOA, and TFA have statutes of limitations provisions of greater than one year.<sup>85</sup>

#### D. Discussion

When viewed against these federal laws and state provisions, Washington’s limitation of mortgage surety liability subverts all other statutes of limitation periods otherwise available to a consumer under the MBPA.<sup>86</sup> The provision’s legislative history is silent as to whether this subversion was even considered. The MBPA was amended in 1993 to provide for the surety bond and to create a consumer’s right of action.<sup>87</sup> The original senate bill, SB 5829, made no mention of the statute of limitations.<sup>88</sup> The “one year” provision was inserted into a substitute bill after referral to the Senate Committee on Labor and Commerce.<sup>89</sup> According to the House report, the bill had “been negotiated over the past two or three years” and was supported by “all parties.”<sup>90</sup> The final bill

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80. *See id.*

81. *Id.* § 1691e(a)-(b).

82. *Id.* § 1691e(a).

83. *Id.* § 1691e(f).

84. *See* WASH. REV. CODE § 19.146.0201(11) (2010) (incorporating the prohibitions of federal statutes and regulations).

85. *See* 12 U.S.C. § 2614 (2006) (RESPA); 15 U.S.C. § 1640(f) (2006) (TILA); 15 U.S.C. § 1691e(f) (ECOA); 15 U.S.C. § 6104(a) (2006) (TFA).

86. *See also* discussions *supra* Part I.C and *infra* Part V. Compare WASH. REV. CODE § 19.146.240(2)(a) (2010), with 12 U.S.C. § 2614, and 15 U.S.C. § 1640(f), and 15 U.S.C. § 1691e(f), and 15 U.S.C. § 6104(a).

87. Act of May 17, 1993, ch. 468, §§ 6(3)(a), 14(1)-(2), 1993 Wash. Sess. Laws 1921, 1925-26, 1930 (codified as amended at WASH. REV. CODE §§ 19.146.205, .240 (2010)).

88. S. 5829, 53d Leg., Reg. Sess. § 14 (Wash. 1993) (enacted) (as referred to S. Comm. on Labor & Commerce, Feb. 16, 1993).

89. *Id.* (as recommended by S. Comm. on Labor & Commerce, Mar. 3, 1993).

90. H.R. 53-5829, Reg. Sess., at 3 (Wash. 1993) (bill report, Apr. 15, 1993).

report described the enactment as specifying “procedures for an aggrieved person to receive payment from the surety bond.”<sup>91</sup>

The implicit result of the surety liability provision is to reward consumer diligence. It compels consumers to be vigilant regarding the processes, documents, terms, and conditions of the transaction. Yet in doing so, it ignores an important reality: even the most sophisticated consumer is challenged by mortgage lending documents, which are voluminous, complex, and difficult to understand.<sup>92</sup> Another reality is that most consumers are not privileged with access to financial or legal counsel who can review or explain mortgage documents and the financial implications of the transaction’s terms.<sup>93</sup>

Given the total absence of legislative history as to why the one-year provision was inserted and kept in, one is left only to speculate. One possible rationale for the limitation was to prevent a “run on claims.” The surety requirement, however, exists for that precise purpose, i.e., to allow consumers to recover damages.<sup>94</sup> Moreover, given that any recovery is payable only after claims have been adjudicated in a civil proceeding,<sup>95</sup> there is minimal danger of such a run occurring. Furthermore, it can be argued that the one-year limitation actually encourages a run on claims by compelling all suspecting consumers to file against the bond as soon as possible. The end result is that the mortgage surety bond one-year statute of limitations encourages premature lawsuits by consumers, compounding their exposure to financial risk.

Another possible rationale may have been to contain the costs of obtaining a bond and therefore discourage entrance into the broker industry. However, this rationale is also unpersuasive given the real costs of surety bonding. According to one prominent surety doing business in Washington, the current cost ranges between \$5.00 and \$7.50 annually per \$1000 of surety coverage, depending on the mortgage broker; this equates to between \$100 and \$150

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91. S. 53-5829, Reg. Sess., at 2 (Wash. 1993) (final bill report, Apr. 20, 1993).

92. See Debra Pogrud Stark, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL’Y & L. 85, 104 & n.74, 105 (2010) (analyzing the “financial incentive” of title companies “to close as quickly as possible,” stating that “agents provide at most general comments on the voluminous documents and do not encourage borrowers to read through them”).

93. Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 478 n.10 (2010) (stating that “[m]ost low-income and moderate-income individuals cannot afford the cost of counsel” and “nearly 71% of legal situations facing low income households in America do not find their way into the justice system”).

94. See WASH. REV. CODE § 19.146.240(1), (2)(b) (2010) (providing that consumers may bring action against surety bonds and have priority in recovery against other valid claimants); WASH. ADMIN. CODE § 208-660-175(6) (2009).

95. WASH. REV. CODE § 19.146.240(2)(a) (providing that superior courts have exclusive jurisdiction over claims against surety bonds).

annually for Washington's minimum coverage of \$20,000.<sup>96</sup> Thus, extending Washington's surety liability to three years, for example, would not appreciably impact the direct costs to those wishing to enter the business. Both possible explanations are wholly unsatisfactory.

## II. THE IMPORTANCE OF MORTGAGE BROKER SURETY

By ensuring that those who enter the mortgage market honor their legal obligations to the state and its consumers, surety bonds serve an important "gate-keep[ing]" function.<sup>97</sup> A surety bond is a reimbursement mechanism, available in the event that the principal-broker fails to compensate the consumer for her loss.<sup>98</sup> Most importantly, surety requirements ensure broker accountability to consumers, who are express beneficiaries under the surety policy.<sup>99</sup> In this sense, surety bonds act as an important consumer safety net whereby the insurer guarantees the performance of the principal.<sup>100</sup>

A surety relationship arises when "when one party *assumes liability* for a debt, default, or other failing of a second party."<sup>101</sup> In the consumer context, this means the consumer has recourse against the surety or its property when the mortgage broker is unable to satisfy an obligation.<sup>102</sup> A surety bond is not insurance *per se*. While both are risk transfer mechanisms in the event of financial loss, they differ in important respects. Relevantly, a surety protects an obligee (i.e., a consumer) from loss, while an insurance policy might protect a

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96. E-mail from Christopher Lopez, Agency Serv. Rep., The Hartford, to Michael L. Vander Giessen, Exec. Editor, *Gonzaga Law Review* (Sept. 21, 2011, 7:57 AM) (on file with *Gonzaga Law Review*). This is a baseline figure. *See id.* Most surety bonds are issued based upon the applicant's creditworthiness, and inferentially, the applicant's risk—utilizing the "three C's" of commercial underwriting: character, capacity, and capital. Balancing those factors may result in a higher premium than the norm. *See id.*; *see also Surety Resources*, SURETY ASS'N OF WASH., <http://www.sawonline.org/surety-resources> (last visited Oct. 15, 2011).

97. Lloyd T. Wilson, Jr., *A Taxonomic Analysis of Mortgage Broker Licensing Statutes: Developing a Programmatic Response to Predatory Lending*, 36 N.M. L. REV. 297, 300 (2006) (stating that bonds serve regulatory and "gatekeep[ing]" functions).

98. *See* BLACK'S LAW DICTIONARY, *supra* note 9, at 1253 (emphasis added).

99. *See supra* note 10.

100. *See supra* notes 11-12 and accompanying text.

101. BLACK'S LAW DICTIONARY, *supra* note 9, at 1580. Specifically, surety status arises where a contract provides an obligee with recourse against another or another's property based on the underlying obligation that a principal obligor already owes to the obligee. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1(1)(a) (1995). Where a suretyship is formed, the surety must perform or pay if the principal obligor defaults. *Id.* § 1(1)(c). The obligee, however, is only entitled to one performance. *Id.* § 1(1)(b).

102. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1 cmt. c, illus. 2.



principal obligor (i.e., a mortgage broker).<sup>103</sup> In addition, while insurers expect a loss in coverage agreements and adjust rates accordingly, surety bonds are priced at the level of satisfactory, acceptable risk with the expectation that the principal will meet its bond obligations.<sup>104</sup> Furthermore, while an insurer's obligation is primary, the surety's obligation is "secondary"; its liability is triggered only in the event that the principal fails to perform or otherwise "default[s] on its obligation[s]."<sup>105</sup> Finally, bond "premiums" are characterized as a service charge and include underwriting expenses.<sup>106</sup> These premiums pay for the financial backing and credit guarantee of the surety bond company.<sup>107</sup>

Every state requires mortgage broker companies to obtain a bond, surety, or alternative form of guaranty as a pre-condition to doing business.<sup>108</sup> While

103. See Carl J. Circo, *Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry*, 58 FLA. L. REV. 561, 614 (2006).

104. See Marla McIntyre & Dev Strischek, *Surety Bonding in Today's Construction Market: Changing Times for Contractors, Bankers, and Sureties*, RMA J., May 2005, at 30, 31, available at <http://www.sio.org/PDF/TodaysMarketMay05.pdf>; *Surety Resources*, *supra* note 96.

105. Henry D. Gabriel, *Standby Letters of Credit: Does the Risk Outweigh the Benefits?*, 1988 COLUM. BUS. L. REV. 705, 713; Michael Stern, Comment, *The Independence Rule in Standby Letters of Credit*, 52 U. CHI. L. REV. 218, 223 (1985).

106. See McIntyre & Strischek, *supra* note 104; *Surety Resources*, *supra* note 96.

107. See *Surety Resources*, *supra* note 96.

108. ALA. CODE § 5-26-14(1) (LexisNexis Supp. 2010); ALASKA STAT. § 06.60.550(a) (2010); ARIZ. REV. STAT. ANN. § 6-903(J), (M) (Supp. 2011); ARK. CODE ANN. § 23-39-505(f)(1)(A) (Supp. 2011); CAL. FIN. CODE § 22112(a) (West Supp. 2011); COLO. REV. STAT. § 12-61-907(1) (2011); CONN. GEN. STAT. ANN. § 36a-492(a) (West Supp. 2011); DEL. CODE ANN. tit. 5, § 2108(a)(1) (2001); D.C. CODE § 26-1103(i) (LexisNexis Supp. 2011); FLA. STAT. ANN. § 494.00172 (West 2010); GA. CODE ANN. § 7-1-1003.2(a) (Supp. 2011); HAW. REV. STAT. § 454F-5(a)(7) (2010), [http://www.capitol.hawaii.gov/hrscurrent/Vol10\\_Ch0436-0474/HRS0454F/HRS\\_0454F-0005.htm](http://www.capitol.hawaii.gov/hrscurrent/Vol10_Ch0436-0474/HRS0454F/HRS_0454F-0005.htm); IDAHO CODE ANN. § 26-31-110(1) (Supp. 2011); 205 ILL. COMP. STAT. ANN. 635/7-12(a) (West Supp. 2011); IND. CODE ANN. § 23-2-5-5(d) (LexisNexis 2010); IOWA CODE ANN. § 535B.9(1) (West 2011); KAN. STAT. ANN. § 9-2211(a) (Supp. 2008); KY. REV. STAT. ANN. § 286.8-060(1) (LexisNexis Supp. 2011); LA. REV. STAT. ANN. § 6:1088(E)(7), (G)(2), (H)-(I) (Supp. 2011); ME. REV. STAT. ANN. tit. 9-A § 13-113 (Supp. 2010); MD. CODE ANN. FIN. INST. §§ 11-508(a), (f), -619(a) (LexisNexis 2011); MASS. ANN. LAWS ch. 255F, § 12(a) (LexisNexis Supp. 2011); MICH. COMP. LAWS ANN. §§ 445.1654(1), 493.159(1) (West 2002 & Supp. 2011); MINN. STAT. ANN. § 58.08(1a) (West Supp. 2011); MISS. CODE ANN. § 81-18-11(1) (Supp. 2011); MO. REV. STAT. § 443.731(1) (Supp. 2010); MONT. CODE ANN. § 32-9-123(1)(a) (2011); NEB. REV. STAT. § 45-724(1) (Supp. 2010); NEV. REV. STAT. § 645B.042(1) (2009), amended by Act of June 17, 2011, ch. 522, § 47, 2011 Nev. Stat. 3594, 3610; N.H. REV. STAT. ANN. § 397-A:5(IV-c)(a)(8) (LexisNexis 2011); N.J. STAT. ANN. § 17:11C-63 (West Supp. 2011); N.M. STAT. ANN. § 58-21-7(A)-(B) (Supp. 2011); N.Y. BANKING LAW § 599-k(1) (McKinney Supp. 2011); N.C. GEN. STAT. § 53-244.103(a)-(b)(1), (d) (2009); N.D. CENT. CODE § 13-04.1-04.1(1) (Supp. 2011); OHIO REV. CODE ANN. § 1322.05(A)(1)-(2)(a) (LexisNexis Supp. 2011); OKLA. STAT. ANN. tit. 59, § 2095.20 (West 2010); OR. REV. STAT. ANN.

thirteen states do not allow a private right of action directly against the broker's bond, surety, or insurance,<sup>109</sup> thirty-six states and the District of Columbia do.

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§ 86A.106(4)-(5) (West Supp. 2011); 7 PA. STAT. ANN. § 6131(e)(3) (West Supp. 2011); R.I. GEN. LAWS § 19-14-6(a)-(b)(2) (Supp. 2010); S.C. CODE ANN. § 40-58-40 (2011); S.D. CODIFIED LAWS § 54-14-24 (Supp. 2011); TENN. CODE ANN. § 45-13-204(a), (c)-(d) (Supp. 2011); TEX. FIN. CODE ANN. § 180.058(a) (West Supp. 2010); UTAH CODE ANN. § 70D-3-205(1)(a) (LexisNexis 2009); VT. STAT. ANN. tit. 8, § 2203(a)(2) (Supp. 2010); VA. CODE ANN. § 6.2-1604 (2010); WASH. REV. CODE § 19.146.205(6)(a) (2010); W. VA. CODE ANN. § 31-17-4(e)(3) (LexisNexis Supp. 2011); WIS. STAT. ANN. § 224.72(4) (West 2009); WYO. STAT. ANN. § 40-23-110(a) (2011); *see also* P.R. LAWS ANN. tit. 7, § 1077 (2011), <http://www.michie.com/puertorico/lpExt.dll?f=templates&eMail=Y&fn=main-h.htm&cp=prcode/6cc6/705b/7458/7478>; V.I. CODE ANN. tit. 9, § 363(h) (2011), <http://www.lexisnexis.com/hottopics/vicode/> (click "Title Nine," "Chapter 20," "Subchapter I," and finally section "363").

109. *See* CAL. FIN. CODE § 22112(a) (West Supp. 2011) ("The bond shall be used for the recovery of expenses, fines, and fees levied by the commissioner in accordance with this division or for losses or damages incurred by borrowers or consumers as the result of a licensee's noncompliance with the requirements of this division."); DEL. CODE ANN. tit. 5, § 2108(a)(1)(c) (2001) ("The bond shall run to the state for the benefit of the office of the State Bank Commissioner and for the benefit of all consumers injured by any wrongful act, omission, default, fraud or misrepresentation by a licensee in the course of its activity as a licensee."); FLA. STAT. ANN. § 494.00172(2) (West 2010) (setting forth the conditions under which "[a] borrower in a mortgage loan transaction is eligible to seek recovery from the trust fund"); KAN. STAT. ANN. § 9-2211(a)(3), (b)(1)(C) (Supp. 2008) ("[T]he bond shall be available for the recovery of expenses, fines and fees levied by the commissioner under this act, and for losses or damages which are incurred by any borrower or consumer as a result of the applicant's or licensee's failure to comply with the requirements of this act."); LA. REV. STAT. ANN. § 6:1088(G)(2) (Supp. 2011) ("The surety bond shall name the office of financial institutions and shall be submitted as prescribed by the commissioner in connection with the application or renewal application."); MICH. COMP. LAWS ANN. § 445.1684(1) (West 2011) ("The commissioner shall prioritize and pay claims against a proof of financial responsibility . . . in a manner that, in his or her discretion, best protects the public interest."); MISS. CODE ANN. § 81-18-11(5) (Supp. 2011) ("All surety bonds shall be in favor, first, . . . for the use, benefit and indemnity of any person who suffers any damage or loss as a result of the company's breach of contract or of any obligation arising from contract or any violation of law, and, second, for the payment of any civil penalties, criminal fines, or costs of investigation and/or prosecution . . ."); MO. REV. STAT. § 443.849(5) (Supp. 2010) ("The surety bond is for the protection of borrowers and the director may make a claim on the bond on behalf of any borrower sustaining injury as the result of the actions of a licensee not in compliance with or in violation of any of the provisions of sections 443.701 to 443.893."); MONT. CODE ANN. § 32-9-123(1)(b) (2011) ("The department shall use the proceeds of the surety bonds to reimburse borrowers or bona fide third parties who successfully demonstrate a financial loss because of an act of a mortgage broker, mortgage lender, or mortgage loan originator that violates the provisions of this part."); N.J. STAT. ANN. § 17:11C-63 (West Supp. 2011) ("The bond shall run to the State for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the business licensee, or its qualifying individual licensees, mortgage loan originators, other employees, or agents."); TEX. FIN. CODE ANN. § 341.605(a) (West Supp. 2010) ("To recover from the

Of those states allowing for private recovery against the broker's bond, surety, or guaranty, only a handful aside from Washington have created express statutes of limitations for such claims.<sup>110</sup> Notably, all of these states, with the exception of Arizona, provide consumers with a longer statutory period to bring suit than Washington.<sup>111</sup> Moreover, like Washington, most states do not provide an express statute of limitations for consumer claims against mortgage brokers.<sup>112</sup> Thus, state statutory limitation periods for claims against a mortgage broker bond, surety, or guaranty generally run concurrently with the statutory limitation periods as applied to mortgage brokers.

The amount of the bond varies by state.<sup>113</sup> Even within states, the bond amount may vary depending on the anticipated or actual business volume of the mortgage broker.<sup>114</sup> Washington, while requiring a minimum bond based upon

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fund, a residential mortgage loan applicant must file a written sworn application with the commissioner in the form prescribed by the commissioner.”); CAL. CODE REGS. tit. 10, § 1437 (2011), <http://government.westlaw.com/linkedslice/search/default.asp?tempinfo=find&RS=GVT1.0&VR=2.0&SP=CCR-1000> (type the title and section numbers into their respective fields and click “Search”); N.Y. COMP. CODES R. & REGS. tit. 3, § 410.14(b) (2011), <http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000> (click “Title 3,” “Chapter III,” “Subchapter B,” “Part 410,” and finally “§ 410.14”) (“Such bond shall be in favor of the superintendent for the protection of the superintendent and residential mortgage consumers located in New York State . . .”); UTAH ADMIN. CODE r. 343-5-2(1) (2011), <http://www.rules.utah.gov/publicat/code/r343/r343-005.htm#T2> (“An individual who applies for a mortgage loan originator license must be covered by a surety bond satisfactory to the department in a sum based on the dollar amount of loans originated, as shown below, to reimburse the state for expenses it may incur in connection with any administrative or judicial proceeding against a current or former licensee relating to mortgage lending activity in Utah.”). Massachusetts’s provisions are ambiguous on whether a private action against the surety exists. *See* MASS. ANN. LAWS ch. 255F, § 12(a) (LexisNexis Supp. 2011); 209 MASS. CODE REGS. 42.06(2) (2011), <http://www.mass.gov/Eoca/docs/dob/209cmr4209152009.pdf>.

110. *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-943(H) (Supp. 2011) (providing a one-year statute of limitations); ARK. CODE ANN. § 23-39-405(d) (2000) (providing a two-year statute of limitations if no action is brought by the state attorney general); KY. REV. STAT. ANN. § 286.8-060(5) (LexisNexis Supp. 2011) (providing a three-year statute of limitations); NEV. REV. STAT. § 645B.048 (2009) (providing a three-year statute of limitations); OKLA. STAT. ANN. tit. 50, § 2095.20 (West 2010) (providing a two-year statute of limitations).

111. *See supra* note 110 and accompanying text.

112. *See, e.g.*, ARK. CODE ANN. §§ 23-39-401 to -518 (2000 & Supp. 2011); MINN. STAT. ANN. §§ 58.01 to .19 (West 2002 & Supp. 2011).

113. *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-943(H) (requiring between \$25,000 and \$100,000); KY. REV. STAT. ANN. § 286.8-060(1) (requiring between \$50,000 and \$250,000); MINN. STAT. ANN. § 58.08(2) (requiring a minimum of \$100,000); 7 PA. STAT. ANN. § 6131(c) (West Supp. 2011) (requiring between \$100,000 and \$500,000); IOWA ADMIN. CODE r. 187-18.2(5) (2011), <http://www.legis.state.ia.us/aspx/ACODocs/DOCS/10-5-2011.187.18.2.pdf> (requiring between \$100,000 and \$150,000).

114. *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-943(H); KY. REV. STAT. ANN. § 286.8-

loans originated, does not require that mortgage brokers demonstrate the existence of a minimum amount of liquid assets.<sup>115</sup> Thus, consumers can never be sure that a mortgage broker has sufficient solvency to cover any claims.

To say nothing of Washington's mortgage surety statute of limitations, mortgage surety liability falls short in other ways. In particular, surety bond liability is limited to the extent of the bond amount.<sup>116</sup> Further, the value of the bond may be inadequate to recompense one wronged consumer, let alone multiple consumers.<sup>117</sup> That said, the fact that every state requires a surety bond in lieu of other evidence of financial fidelity makes the importance of mortgage surety bonds apparent.<sup>118</sup> Moreover, these consumer protections are especially important in light of the recent implosion of the mortgage industry.

### III. MORTGAGE BROKERS AND THEIR ROLE IN THE FORECLOSURE CRISIS

The confluence of the mortgage lending boom, perverse incentives, insufficient transparency in the lending process, and lax broker licensing regulations provided the perfect opportunity for mortgage brokers to engage in fraudulent, unfair, and deceptive practices.<sup>119</sup>

The white-hot housing market was fueled by financial institutions that could not lend enough money to keep up with consumer demand.<sup>120</sup> As demand for home-buying grew, financial institutions devised intricate, but risky, residential mortgage loan products: "liar" loans (stated income),<sup>121</sup> "no

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060(1); MINN. STAT. ANN. § 58.08(2); 7 PA. STAT. ANN. § 6131(c); IOWA ADMIN. CODE r. 187-18.2(5).

115. See WASH. ADMIN. CODE §§ 208-660-155, -163(1)(e) (2009).

116. See, e.g., ARK. CODE ANN. § 23-39-505(f)(3); D.C. CODE § 26-1103(i)(5) (LexisNexis Supp. 2011); N.C. GEN. STAT. § 53-244.103(c) (2009); OHIO REV. CODE ANN. § 1322.05(A)(1) (LexisNexis Supp. 2011).

117. Wilson, *supra* note 97, at 307 (advocating an increase in the bond amount).

118. Some states have established a fund—a pool of monies supplied by licensed mortgage brokers and originators—against which aggrieved consumers make a claim. See, e.g., ALASKA STAT. § 06.60.500 (2010); FLA. STAT. ANN. § 494.00172 (West 2010); HAW. REV. STAT. § 454F-41(a) (2010), [http://www.capitol.hawaii.gov/hrscurrent/Vol10\\_Ch0436-0474/HRS0454F/HRS\\_0454F-0041.htm](http://www.capitol.hawaii.gov/hrscurrent/Vol10_Ch0436-0474/HRS0454F/HRS_0454F-0041.htm); IDAHO CODE ANN. § 26-31-113(1) (Supp. 2011); TEX. FIN. CODE ANN. § 156.501(a) (West 2006); UTAH CODE ANN. § 61-2c-501(1) (LexisNexis Supp. 2011).

119. ERIC S. BELSKY & NELA RICHARDSON, UNDERSTANDING THE BOOM AND BUST IN NONPRIME MORTGAGE LENDING 112 (2010), available at <http://www.jchs.harvard.edu/publications/finance/UBB10-1.pdf>; RICHARD BITNER, CONFESSIONS OF A SUBPRIME LENDER 57-59 (2008).

120. See Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 35-36, 38 (2009) (describing the sharp increases in consumer demand that occurred between 1995 and 2006).

121. *Id.* at 41.

doc” loans,<sup>122</sup> interest-only loans,<sup>123</sup> and payment-option adjustable rate mortgages.<sup>124</sup> Each of those products is marked by high-cost payment deferrals, hidden costs, and complexity.<sup>125</sup> Such exotic loan products became the foundation upon which the subprime<sup>126</sup> residential mortgage lending market was built,<sup>127</sup> ultimately proving to be lucrative for all involved—except the borrower. Chasing higher profits under the guise of helping the historically marginalized realize the “American Dream,”<sup>128</sup> lenders also presented these complex and obfuscating loan products to mortgage brokers, who would, in turn, offer them to borrowers.<sup>129</sup>

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122. Baldy Martinez, Comment, *Subprime Loans: Turning the American Dream into a Nightmare*, 21 ST. THOMAS L. REV. 514, 520 (2009). “No doc” loans were those granted where the prospective borrower presented no evidence of income or assets. *Id.*

123. Katzman, *supra* note 64, at 500 & n.23. With “interest only loans,” borrowers pay interest alone for a fixed period, e.g., five years, with no reduction of the principal. *Id.*

124. Katzman, *supra* note 64, at 500 & n.24. Under payment-option adjustable rate mortgages, borrowers can opt to make payments based on an initial low interest rate (a “teaser” rate), an interest only payment, or a traditional, fully amortizing payment. *Id.*

125. Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1076-77 (2009).

126. While a subprime mortgage loan can technically be characterized as any loan conferred above the prime rate of borrowing at a given point in time, it can also be defined in more fixed terms. For example, Professor Oren Bar-Gill divides the residential mortgage market into a “prime segment” and a “nonprime segment.” Bar-Gill, *supra* note 124, at 1076 n.5. He further divides the nonprime segment into “subprime (higher risk) and Alt-A (lower risk),” noting that “the line between subprime and Alt-A is not always clear.” *Id.* The term “subprime” is not consistently defined in the marketplace or among individual institutions. However, characteristics of a borrower’s credit risk are usually determinative. *See* Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37,569, 37,570 (July 10, 2007). For example, the Office of the Inspector General defines a “subprime” mortgage loan as one resulting when a borrower has a FICO score below 620, made a late mortgage payment within the preceding twelve months, filed bankruptcy within the preceding twenty-four months, or underwent foreclosure within the preceding thirty-six months. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF TREASURY, SER. NO. OIG-09-032, SAFETY AND SOUNDNESS: MATERIAL LOSS REVIEW OF INDYMAC BANK, FSB 53 (2009), available at <http://www.treasury.gov/about/organizational-structure/ig/Documents/oig09032.pdf>.

127. MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* 8-9 (2010). Subprime residential mortgage lending began in the early 1990s. *Id.*

128. *Cf.* LEWIS, *supra* note 127, at 9 (“The growing interface between high finance and lower-middle-class America was assumed to be good for lower-middle-class America.”).

129. It is also important to note the fact that minorities and women were disproportionately placed with subprime products, even after controlling for objective criteria such as credit score and amount of cash reserves. *See* TAMARA JAYASUNDERA ET AL., NAT’L CMTY. REINVESTMENT COAL., *FORECLOSURE IN THE NATION’S CAPITAL: HOW UNFAIR AND RECKLESS LENDING UNDERMINES HOMEOWNERSHIP* 3 (2010), available at [http://www.ncrc.org/images/stories/pdf/research/ncrc\\_foreclosure\\_paper\\_final.pdf](http://www.ncrc.org/images/stories/pdf/research/ncrc_foreclosure_paper_final.pdf); Bar-Gill, *supra* note 125, at 1139; Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities*

Mortgage brokers are paid for sourcing and originating loans, primarily through fees and commissions financed by the prospective borrowers.<sup>130</sup> Thus, the housing boom made entry into the mortgage lending profession very attractive. Between 2001 and 2006, the number of mortgage brokerages increased by fifty percent, growing to over 50,000.<sup>131</sup> In January 2001, there were 327,000 mortgage bankers or brokers in the United States.<sup>132</sup> One year later, that number rose by over 80,000.<sup>133</sup> Mortgage banker and broker jobs peaked in September 2005 at 521,900.<sup>134</sup> The absence of rigorous state licensing requirements regarding capitalization, broker background (such as criminal or fraud-related convictions, bankruptcies, and credit-worthiness), experience, and education enabled this growth.<sup>135</sup>

As banks and other financial service entities went on their lending spree, mortgage brokers began to originate the vast majority of residential loans. At the housing boom's peak in 2006,<sup>136</sup> mortgage brokers accounted for sixty-

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in *High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 362 (2009); Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL'Y 121, 125 (2009); see also NAT'L COUNCIL OF NEGRO WOMEN, INCOME IS NO SHIELD, PART III, ASSESSING THE DOUBLE BURDEN: EXAMINING RACIAL AND GENDER DISPARITIES IN MORTGAGE LENDING (2009), available at [http://www.ncnw.org/images/double\\_burden.pdf](http://www.ncnw.org/images/double_burden.pdf).

130. The loan originator, typically a mortgage broker, is often compensated by the borrower and the lender. See Peter J. Hong & Marcos Reza, *Hidden Costs to Homeowners: The Prevalent Non-Disclosure of Yield Spread Premiums in Mortgage Loan Transactions*, 18 LOY. CONSUMER L. REV. 131, 132-33 (2005). A broker may earn direct fees from the borrower, generally between one-half percent and three percent of the loan amount. John M. Quigley, *Compensation and Incentives in the Mortgage Business*, ECONOMISTS' VOICE, Oct. 2008, at 1, 2. A broker may also earn indirect fees from the lender, such as a yield spread premium ("YSP"). See Hong & Reza, *supra*, at 132-33. A YSP is the present value of the difference between the interest rate that the broker obtained for the loan and the lowest rate the mortgage banker would have accepted for the specific transaction (the "par rate"). *Id.* These YSPs vary depending upon the interest rate of the loan and other pricing terms. *Id.*

131. Most experts estimate the modern housing bust as beginning in early 2007. BITNER, *supra* note 119, at 42 (recounting that the housing market peaked in and around 2006); LEWIS, *supra* note 127, at 180 (recalling that "subprime loans were defaulting in record numbers" by early 2007).

132. Brian Collins, *Jobs Jump in January*, NAT'L MORTGAGE NEWS, Feb. 12, 2001, at 1.

133. *Inside Track*, NAT'L MORTGAGE NEWS, Feb. 17, 2003, at 1 (noting that mortgage jobs increased sixteen and two-thirds percent from just a year earlier, totaling 412,400 as of that date).

134. *Industry Employment Continues to Grow*, MORTGAGE SERVICING NEWS, Oct. 2005, at 22. In 2000, there were few barriers to entering the mortgage brokerage market, as most states did not yet have licensing requirements in place. BITNER, *supra* note 119, at 48.

135. See Lloyd T. Wilson, Jr., *All Things Considered: The Contribution of the National Mortgage Licensing System to the Battle Against Predatory Lending*, 24 GA. ST. U. L. REV. 415, 422, 424 (2007).

136. Major Coleman IV et al., *Subprime Lending and the Housing Bubble: Tail Wags*

eight percent of all residential mortgages.<sup>137</sup> In 2006, just before the housing crash, brokers originated fifty-eight percent of all residential loans.<sup>138</sup> Ominously, at that same time, mortgage brokers were originating as many as seventy percent of subprime loans.<sup>139</sup>

Mortgage brokers would realize greater commissions from subprime loans because lenders incentivized high-interest loan generation.<sup>140</sup> Mortgage brokers also cashed in through other finance-backed incentives.<sup>141</sup> Brokers inserted “junk fees”<sup>142</sup> and steered prime borrowing candidates into subprime loans.<sup>143</sup> Brokers also engaged in self-dealing (e.g., setting up a finance entity working alongside its brokerage),<sup>144</sup> and provided kickbacks to shell companies or appraisers (e.g., inflating the value of home to obtain higher fees and monies from a lender).<sup>145</sup>

It is a devastating fact that mortgage brokers could generate these loans and obtain immediate recognition of commissions and closing fees while having little to no risk if the loan went bad.<sup>146</sup> Given the pace of the boom and

*Dog?*, 17 J. HOUSING ECON. 272, 273 (2008).

137. *Examiner*, CONF. ST. BANK SUPERVISORS, (Sep. 22, 2006), <http://www.csbs.org/news/csbs-examiner/Documents/2006/examiner-092206.htm>.

138. Paul Davidson, *Mortgage Brokers Fall on Tough Times*, USA TODAY, Aug. 31, 2007, [http://www.usatoday.com/money/economy/housing/2007-08-30-mortgage-brokers\\_N.htm](http://www.usatoday.com/money/economy/housing/2007-08-30-mortgage-brokers_N.htm).

139. One authoritative survey found that, in 2006, mortgage brokers were originating seventy-one percent of subprime residential loans. MIKE FRATATONI, MORTGAGE BANKERS ASS’N, RESIDENTIAL MORTGAGE ORIGINATION CHANNELS 1 (2006), *available at* [http://www.mortgagebankers.org/files/Bulletin/InternalResource/44664\\_September2006-ResidentialMortgageOriginationChannels.pdf](http://www.mortgagebankers.org/files/Bulletin/InternalResource/44664_September2006-ResidentialMortgageOriginationChannels.pdf).

140. MORTGAGE BANKERS ASS’N, MORTGAGE BANKERS AND MORTGAGE BROKERS: DISTINCT BUSINESSES WARRANTING DISTINCT REGULATION 16 (2008), *available at* [http://www.mbaa.org/files/Advocacy/8476\\_GAR\\_Broker\\_Report.pdf](http://www.mbaa.org/files/Advocacy/8476_GAR_Broker_Report.pdf).

141. MORTGAGE BANKERS ASS’N, *supra* note 140.

142. Gretchen Morgenson, *Given a Shovel, Americans Dig Deeper into Debt*, N.Y. TIMES, July 20, 2008, at A1, *available at* <http://www.nytimes.com/2008/07/20/business/20debt.html?scp=1&sq=Given%20a%20Shovel,%20Americans%20Dig%20Deeper%20Into%20Debt&st=cse>.

143. *Id.* at 18.

144. *See, e.g.*, N. Am. Real Estate Servs., Inc., No. 08:055:MBB, slip op. at 8-10, 24-25 (N.C. Office of the Comm’r of Banks June 24, 2009), *available at* [http://www.nccob.org/mlenforcements2/08\\_055.pdf](http://www.nccob.org/mlenforcements2/08_055.pdf) (imposing sanctions on Pacific Bancorp Group, Inc. for engaging in mortgage brokering through unlicensed agents and shell corporations).

145. *2007 Mortgage Fraud Report*, F.B.I. (Apr. 2008), <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2007> (describing the categories of mortgage fraud that FBI investigators began identifying in 2006).

146. *See* Kelly D. Edminston & Roger Zalneraitis, *Rising Foreclosures in the United States: A Perfect Storm*, ECON. REV. FED. RES. BANK KAN. CITY, Fourth Quarter 2007, at 115, 129-30; *see also* Kathleen C. Engel & Patricia A. McCoy, Commentary, *A Tale of Three Markets Revisited*, 82 TEX. L. REV. 439, 443 (2003) (discussing how loan pricing can

brokers' lack of an ongoing financial stake in loan performance, brokers were enticed to close loans, maximize fees, and move on to the next transaction.<sup>147</sup> With few countervailing incentives to work in the borrowers' best interests, it was little wonder why mortgage brokers could be subject to suit for any number of fraudulent, unfair, or deceptive practices.<sup>148</sup>

Unfortunately, as the market crashed, mortgage brokers disappeared. In 2007, American Home Mortgage, at one time the nation's tenth-largest home lender, filed for bankruptcy and laid off over 6000 employees.<sup>149</sup> That same year, the number of mortgage brokers and originators decreased to 470,700.<sup>150</sup> By January 2008, the mortgage lending sector had shed an additional 87,000 jobs.<sup>151</sup> As lending continued to decline, banking institutions began to sever their relationships with mortgage brokers. In 2009, for example, JP Morgan Chase reduced the number of brokers it worked with by ninety percent.<sup>152</sup> Thousands of proprietary mortgage brokers have either fled the business or been put out of business.<sup>153</sup>

Washington State was not immune to the industry's decimation. In 2007, nearly 2000 mortgage brokers and over 13,500 loan originators received a Washington State license.<sup>154</sup> As of January 2008, however, "only [sixty-six]

be "rent seeking" when not "risk-based"); Lloyd T. Wilson, Jr., *Effecting Responsibility in the Mortgage Broker-Borrower Relationship: A Role for Agency Principles in Predatory Lending Regulation*, 73 U. CIN. L. REV. 1471, 1479-81 (2005).

147. See Alan M. White, *The Case for Banning Subprime Mortgages*, 77 U. CIN. L. REV. 617, 633-34 (2008).

148. See WASH. REV. CODE § 19.146.005 (2010).

149. *American Home Mortgage Seeks Chapter 11 Bankruptcy Protection*, N.Y. TIMES, Aug. 7, 2007, <http://www.nytimes.com/2007/08/07/business/07home.html?scp=1&sq=american%20home%20mortgage%20bankruptcy&st=cse>; *One Mortgage Lender, at Least, Is Hiring*, N.Y. TIMES, Aug. 29, 2007, <http://www.nytimes.com/2007/08/29/business/29lend.html?sq=american%20home%20mortgage%20bankruptcy&st=cse&adxnnl=1&scp=10&adxnnlx=1318738011-Y4MMrfHw0Hphkljij76eKg>.

150. *Inside Track*, NAT'L MORTGAGE NEWS, June 11, 2007, at 1.

151. *MortgageWire Roundup: Mortgage Banking Jobs Stabilizing*, NAT'L MORTGAGE NEWS, Mar. 17, 2008, at 22.

152. Les Christie, *Lenders Drop Mortgage Brokers*, CNN, Feb. 12, 2009, [http://money.cnn.com/2009/02/12/real\\_estate/lenders\\_drop\\_mortgage\\_brokers/index.htm](http://money.cnn.com/2009/02/12/real_estate/lenders_drop_mortgage_brokers/index.htm).

153. See Paul Muolo, *The Great Disappearing Nonbank Loan Officers?*, NAT'L MORTGAGE NEWS, Jan. 31, 2011, at 2 (citing Marc Savitt, former president of the National Association of Mortgage Brokers, as estimating that about seventy percent of brokers and loan originators not affiliated with banks had either lost or quit their jobs); *State of the State*, NAT'L MORTGAGE NEWS, Jan. 24, 2011, at 4 (reporting that in Texas the number of mortgage licensees, including both brokers and bankers, fell from 29,687 to 9,897 between 2004 and 2011).

154. *Fewer Mortgage Brokers and Loan Originators Renew Licenses to Do Business in Washington State for 2008*, WASH. ST. DEP'T FIN. INSTITUTIONS (Jan. 2, 2008), [http://www.dfi.wa.gov/consumers/news/2008/fewer\\_mortgage\\_brokers.htm](http://www.dfi.wa.gov/consumers/news/2008/fewer_mortgage_brokers.htm).



percent of previously licensed mortgage brokers and [forty-two] percent of previously licensed loan originators renewed or were approved to do business in Washington State.”<sup>155</sup>

Scott Jarvis of the Washington Department of Financial Institutions surmised that “the reduction reflect[ed] a dramatic drop in loan activity due to the downturn of the mortgage industry and a number of firms going out of business or dropping their state license . . . .”<sup>156</sup>

The mortgage industry’s implosion made it painfully clear that wronged consumers could be deprived of any redress from the principal wrongdoer. As one commentator stated, “[a] cause of action is cold comfort . . . if the offending broker is unable to pay a judgment entered against him or her.”<sup>157</sup> In theory, consumers defrauded by the thousands of mortgage brokers who have closed shop, are defunct, or otherwise unable to pay could resort to recovery through the broker’s surety. In Washington, however, the cold comfort is even colder: if the borrower does not discover her injuries within a year, all remedies are nonexistent.<sup>158</sup>

#### IV. WHETHER WASHINGTON LAW OR POLICY VOIDS THE MORTGAGE SURETY LIABILITY LIMITATION PROVISION

Wronged consumers may be able to invoke equitable principles to extend the MBPA surety statute of limitations beyond one year.<sup>159</sup> As a general proposition, certain statute of limitations provisions are established to prevent the filing of stale claims.<sup>160</sup> Statutes of limitations intended to prevent stale claims are jurisdictional in nature and are strictly construed.<sup>161</sup> In contrast, Washington’s mortgage broker surety liability is solely contingent upon the liability of the principal: the mortgage broker.<sup>162</sup> Any disdain for stale claims, therefore, cannot be a rationale for limiting surety liability to one year.

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155. *Id.*

156. *Id.*

157. Wilson, *supra* note 97, at 319.

158. See WASH. REV. CODE § 19.146.240(2)(a) (2010).

159. See *id.* § 19.146.240 (demonstrating that it is not jurisdictional where, by its own terms, surety liability is solely contingent upon the liability of the principal—the mortgage broker); *In re Hoisington*, 993 P.2d 296, 300 (Wash. Ct. App. 2000) (noting that the MBPA surety statute of limitations provision is not jurisdictional, and thus, permits the application of equitable principles).

160. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp. 2d 1091, 1106 (W.D. Wash. 2007).

161. See 1 AM. JUR. 2D *Actions* § 66 (2005); 51 AM. JUR. 2D *Limitation of Actions* § 54 (2000).

162. See WASH. REV. CODE § 19.146.240(1).

One equitable argument for extending the statute of limitations provision turns upon the contractual relationship between the consumer and the surety. If a consumer is the subject of the contract between the mortgage broker and surety, then third-party beneficiary principles should apply.<sup>163</sup> By its very language, a surety contract is established to compensate consumers in the event that the contract principal cannot or will not.<sup>164</sup> Third-party beneficiary rules thus dictate that a six-year statute of limitations should apply.<sup>165</sup> Under that theory, if a consumer receives a direct benefit through a contract, she may sue to enforce the contract.<sup>166</sup> Whether or not a party is an intended beneficiary to a contract depends on the construction of the contract and the intention of the parties.<sup>167</sup>

Another possible theory for extending the one-year limitation period is equitable tolling. That doctrine allows for a limitations period to toll in the event of bad faith, deception, or false assurances.<sup>168</sup> Washington applies equitable tolling when “consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.”<sup>169</sup> The purpose of the MBPA is to protect consumers from unfair or deceptive practices including violations of federal laws and state common law.<sup>170</sup> The purpose of the one-year statute of limitations is, at best, arguable.<sup>171</sup> Thus, a consumer could plausibly contend that tolling the statute would not undermine its purpose.

Moreover, a surety incurs no prejudice from allowing the one-year statute of limitations to toll because it will still be in a position to defend against an appellant’s claims and it has, arguably, accounted for these potential costs as part of its risk assessment.<sup>172</sup> Although the equitable tolling doctrine examines excusable delay by the plaintiff, it does so against bad faith or concealment by

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163. See *Lybecker v. United Pac. Ins. Co.*, 406 P.2d 945, 949 (Wash. 1965).

164. See *Surety Resources*, *supra* note 96.

165. See WASH. REV. CODE § 4.16.040(1) (2010); *Indus. Coatings Co. v. Fid. & Deposit Co. of Md.*, 817 P.2d 393, 397-98 (Wash. 1991).

166. See, e.g., *Coast Trading Co. v. Parmac, Inc.*, 587 P.2d 1071, 1076 (Wash. Ct. App. 1978).

167. See, e.g., *id.* (“The intention of the parties in this respect is determined by the terms of the contract as a whole construed in the light of the circumstances under which it was made.” (quoting *Grand Lodge v. U.S. Fid. & Guar. Co.*, 98 P.2d 971, 975 (Wash. 1940))). Washington courts have determined that surety bond contracts create third-party beneficiaries. E.g., *Indus. Coatings Co.*, 817 P.2d at 396; *Lybecker*, 406 P.2d at 949.

168. *Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998).

169. See *id.* at 797.

170. WASH. REV. CODE §§ 19.146.005, .0201 (2010).

171. See *supra* notes 87-91 and accompanying text.

172. See 3 NAZANIN LANKARANI ET AL., BUSINESS INSURANCE LAW AND PRACTICE GUIDE § 25.03[2][d], at 25-15 (2009) (noting that insurance companies factor in risk of loss when calculating premiums).

the *primary wrongdoer* whom caused the delay.<sup>173</sup> Where it cannot be shown that the surety engaged in any wrongdoing or concealment, Washington courts will not apply the doctrine.<sup>174</sup>

A final possible theory is the discovery rule.<sup>175</sup> The discovery rule states that an action accrues when the plaintiff discovers or reasonably should discover all the facts necessary to establish the elements of her claim.<sup>176</sup> The rule is applied to claims for which the plaintiff, through no fault of her own, could not have known of her injuries due to, for example, professional malpractice.<sup>177</sup> In Washington, the types of professionals captured by this discovery rule resemble mortgage brokers.<sup>178</sup> The rationale behind the extension is that “consumers of professional services frequently [do] not have the means or ability to discover professional malpractice.”<sup>179</sup>

Whether an aggrieved consumer acted with due diligence is a key issue of fact in applying the discovery rule.<sup>180</sup> Thus, there is no certainty that a consumer will prevail on a claim against a surety outside of one year. That said, given the complex nature of mortgage transactions, the voluminous documents, and lack of transparency evinced by many mortgage brokers, it is folly to expect a consumer to know of her injury within one year, except for the most egregious instances of fraud or deception.

Even if consumers could deploy equitable principles in trying to secure recovery through a surety, redress is not guaranteed. Courts are loath to apply third-party beneficiary and equitable tolling principles to defeat the expressed legislative intent reflected in Washington’s MBPA.<sup>181</sup> Moreover, equitable tolling is not available in Washington absent a showing of bad faith or

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173. See *Millay*, 955 P.2d at 797; see also *In re Hoisington*, 993 P.2d 296, 300 (Wash. Ct. App. 2000); *Finkelstein v. Sec. Props., Inc.*, 888 P.2d 161, 167 (Wash. Ct. App. 1995).

174. *Millay*, 955 P.2d at 797.

175. *Gazija v. Nicholas Jems Co.*, 543 P.2d 338, 342 (Wash. 1975).

176. *White v. Johns-Manville Corp.*, 693 P.2d 687, 693 (Wash. 1985); *Ohler v. Tacoma Gen. Hosp.*, 598 P.2d 1358, 1360 (Wash. 1979).

177. *In re Estate of Hibbard*, 826 P.2d 690, 696 (Wash. 1992). Courts also apply the discovery rule to cases involving fraudulent concealment by the defendant. See, e.g., *Crisman v. Crisman*, 931 P.2d 163, 166 (Wash. Ct. App. 1997).

178. Physicians, surveyors, insurance agents, and attorneys are also subject to Washington’s discovery rule. *Peters v. Simmons*, 552 P.2d 1053, 1055 (Wash. 1976); see also WASH. REV. CODE § 4.16.350(3) (2010) (providing a discovery rule in medical malpractice claims); *Matson v. Weidenkopf*, 3 P.3d 805, 811 (Wash. Ct. App. 2000) (applying the discovery rule to a legal malpractice claim).

179. *Peters*, 552 P.2d at 1057.

180. *Mayer v. Huesner*, 107 P.3d 152, 157 (Wash. Ct. App. 2005).

181. *State v. Jackson*, 976 P.2d 1229, 1235 (Wash. 1999) (“This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that ‘the drafting of a statute is a legislative, not a judicial, function.’” (quoting *State v. Enloe*, 734 P.2d 520, 523 (Wash. 1987))).

deception by the surety itself.<sup>182</sup> Because courts are reluctant to nullify express statutory language—even in circumstances that seem to contradict the underlying purpose of the predominant statute—arguments relying on third-party beneficiary principles, equitable tolling, or the discovery rule are likely of no avail.<sup>183</sup>

#### V. WHETHER FEDERAL REGULATION OF THE MORTGAGE INDUSTRY PREEMPTS THE MBPA SURETY LIABILITY LIMITATION PROVISION

Whether federal consumer protection laws preempt Washington's mortgage surety liability statute of limitation requires a two-part examination. First, whether Congress has expressly preempted state law, and if not, whether it has impliedly done so.

The question of federal preemption is, in the first instance, a constitutional one. The Supremacy Clause of the Constitution establishes that state laws are only superseded by the clear and manifest purpose of Congress.<sup>184</sup> As for statutes of limitations periods, "[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."<sup>185</sup> But as Justice Frankfurter observed, "[t]he rub comes when Congress is silent."<sup>186</sup>

Preemptive intent, on the other hand, may be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."<sup>187</sup> Importantly, even when Congress's regulatory scheme has not been so pervasive, preemption may exist when "compliance with both federal and state regulations is a physical impossibility,"<sup>188</sup> or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>189</sup> It is this last circumstance that calls into question the constitutionality of Washington's MBPA mortgage surety statute of limitation provision.

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182. See *Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998).

183. See *Larry v. Hartford Fire Ins. Co.*, No. 62444-0-I, 2009 WL 1546606, at \*3 (Wash. Ct. App. June 1, 2009).

184. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (declaring as invalid those state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution").

185. *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946).

186. *Id.*

187. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

188. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

189. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

### A. No Explicit Preemption

Mortgage brokers are governed by a host of federal laws and regulations. In addition to TILA, RESPA, TFA, and ECOA, mortgage brokers must comply with the Home Mortgage Disclosure Act,<sup>190</sup> the Gramm-Leach-Bliley Act,<sup>191</sup> and the Federal Trade Commission Act.<sup>192</sup> Moreover, brokers are regulated by the United States Department of Housing and Urban Development (e.g., Regulation X),<sup>193</sup> and the Federal Reserve Board (e.g., Regulation Z).<sup>194</sup> The question is whether the MBPA's mortgage broker surety statute of limitations is unconstitutional because it effectively shortens a consumer's recovery under federal claims to one year. Notably, no state or federal case law has examined the inconsistency between Washington's broker and surety liability statutes of limitations.<sup>195</sup> Moreover, even though the Federal Reserve's Board of Governors is responsible for determinations of state law inconsistency,<sup>196</sup> it has issued no determination as to this conflict.

190. 12 U.S.C. §§ 2801-2810 (2006 & Supp. IV 2010).

191. 15 U.S.C. §§ 6801-6809 (2006 & Supp. IV 2010).

192. 15 U.S.C. §§ 41-58 (2006 & Supp. IV 2010).

193. 24 C.F.R. pt. 3500 (2011).

194. 12 C.F.R. pt. 226 (2011). Mortgage brokers are also subject to federal criminal statutes and civil racketeering statutes. *See, e.g.*, 18 U.S.C. § 1014 (2006 & Supp. IV 2010) (establishing sanctions for those who “knowingly make[] any false statement or report, or willfully overvalue[] any land, property or security . . . in connection with a mortgage loan”); *id.* § 1028(a)(1) (2006) (prohibiting the presentation or use of a falsified identification document or other identifying information that appears to have been issued by the United States); 18 U.S.C. § 1341 (2006 & Supp. IV 2010) (prohibiting mail fraud); *id.* § 1343 (prohibiting wire fraud); 18 U.S.C. § 1964(c) (2006) (providing civil remedies for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) violations).

195. One federal case came close to addressing the issue of preemption with regard to Arizona's mortgage broker statutes. *See Mortensen v. Home Loan Ctr., Inc.*, No. CV-08-1669-PHX-DGC, 2009 WL 113483, at \*5 (D. Ariz. Jan. 16, 2009). The plaintiff in *Mortensen* asserted four claims: two TILA violations, breach of fiduciary duty, and surety bond relief. *Id.* at \*1. In a motion to dismiss, the court applied equitable tolling principles to uphold a TILA claim and the breach of fiduciary duty claim. *See id.* at \*3-4. The court also upheld the plaintiff's final claim for surety bond relief to the extent it was premised on the others. *Id.* at \*5. But the defendants argued further that the surety bond claim was time-barred under the one-year statute of limitations, ARIZ. REV. STAT. ANN. § 6-943(H) (1999), because the three-year statute of limitations, ARIZ. REV. STAT. ANN. § 12-543(3) (2003), did not apply as the plaintiff alleged no fraud. *Id.* Despite these contentions, the court denied the motion to dismiss, concluding that the complaint could reasonably be understood as alleging fraud. *Id.*

196. *See, e.g.*, 12 C.F.R. pt. 226 app. A (2011) (“A request for a determination that a State law is inconsistent or that a State law is substantially the same as the Act and regulation shall be in writing and addressed to the Secretary, Board of Governors of the Federal Reserve System . . .”).

Recent legislation and regulatory rules went far in federalizing the conduct of mortgage brokers. The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“SAFE”)<sup>197</sup> was a sweeping response to the foreclosure crisis and evidence of rampant unfair, deceptive, and even fraudulent acts. Now, mortgage originators<sup>198</sup> are subject to strict pre-license qualifications.<sup>199</sup> Among other directives, federal law requires mortgage brokers to make good-

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197. 12 U.S.C. §§ 5101-5116 (Supp. IV 2010).

198. *Id.* § 5102(3)(A)-(B). The statute provides as follows:

(A) In general

The term “loan originator”—

(i) means an individual who—

(I) takes a residential mortgage loan application; and

(II) offers or negotiates terms of a residential mortgage loan for compensation or gain;

(ii) does not include any individual who is not otherwise described in clause (i) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such clause;

(iii) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless the person or entity is compensated by a lender, a mortgage broker, or other loan originator or by any agent of such lender, mortgage broker, or other loan originator; and

(iv) does not include a person or entity solely involved in extensions of credit relating to timeshare plans, as that term is defined in section 101(53D) of title 11.

(B) Other definitions relating to loan originator.

For purposes of this subsection, an individual “assists a consumer in obtaining or applying to obtain a residential mortgage loan” by, among other things, advising on loan terms (including rates, fees, other costs), preparing loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.

*Id.*

199. See 12 U.S.C. § 5104(a) (requiring states to conduct background checks); *id.* § 5104(b) (mandating minimum standards that no loan originator license may issue to one who has had a loan originator license revoked, or who received the consequences of a felony involving fraud, dishonesty, breach of trust, or money laundering); *id.* § 5104(b)(3) (requiring license applicants to show “financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the loan originator will operate honestly, fairly, and efficiently within the purposes of [SAFE]”); *id.* § 5104(c) (requiring pre-license education); *id.* § 5104(d) (requiring a written test). To unify oversight of mortgage originators, SAFE gave states one year to establish legislation in accordance with national standards and allow them to participate in a new Nationwide Mortgage Licensing System and Registry. See *id.* § 5107(a). Section 5107 cedes to the Department of Housing and Urban Development the Task of determining whether a state’s regulatory regime meets the minimum requirements of SAFE. *Id.* § 5107(d).

faith determinations as to a prospective borrowers' ability to repay a loan<sup>200</sup> and to evince transparency in the loan obligations and terms.<sup>201</sup> Importantly, 12 U.S.C. § 5104 requires states to ensure that the license applicant meets "either a net worth or surety bond requirement"<sup>202</sup> in an amount reflecting the dollar amount of loans originated by mortgage brokers, or to have paid into a state fund.<sup>203</sup>

Congressional enactment of the Dodd-Frank Act in 2010 reflected a tightened federal regulatory regime. For example, Dodd-Frank expressly prohibits incentives to steer prospective borrowers into subprime loan products,<sup>204</sup> and circumscribes unfair practices, such as yield spread premiums.<sup>205</sup> Despite its accomplishments toward enhancing proscriptions in the mortgage lending industry, Dodd-Frank went no further to direct the manner in which states should structure mortgage originator-surety relationships. Consequently, the surety-broker statute of limitations gap has still gone unaddressed.<sup>206</sup>

Dodd-Frank provides that state consumer protection provisions are preempted if they are "inconsistent with [Dodd-Frank], and then only to the extent of the inconsistency."<sup>207</sup> In addition, Dodd-Frank preempts state laws that conflict with TILA, RESPA, TFA, and ECOA.<sup>208</sup> Nothing in Dodd-Frank requires states to allow claims against the broker's surety. Moreover, no provision in the act demands that, in the event that a state allows recovery from

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200. See Dodd-Frank Act, Pub. L. No. 111-203, § 1411(a)(2), 124 Stat. 1376, 2142 (2010) (to be codified at 15 U.S.C. § 1639c).

201. See *id.* § 1414(c), 124 Stat. at 2152-53 (requiring notice to borrowers about safeguarding against loss of their anti-deficiency protection); *id.* § 1418(a), 124 Stat. at 2153-54 (requiring notice to borrowers regarding reset of their hybrid adjustable rate mortgages); *id.* § 1420, 124 Stat. at 2155-56 (requiring regular disclosures in monthly statements to borrowers).

202. 12 U.S.C. § 5104(b)(6).

203. *Id.* § 5107(d)(6).

204. Dodd-Frank Act § 1403, 124 Stat. at 2139-41.

205. The Federal Reserve Board has been charged to issue additional regulations to "prohibit or condition terms, acts, or practices" that it finds "abusive, unfair, deceptive, [or] predatory," as is "necessary or proper" to ensure the affordability and availability of mortgage credit. *Id.* § 1405(a), 124 Stat. at 2141.

206. The Office of Comptroller of Currency ("OCC") was also given new powers with respect to mortgage loan originators. 12 U.S.C. § 24a (2006). However, nothing in that statute nor OCC regulations establish co-extensive liability requirements for mortgage brokers and sureties. See *id.*

207. Dodd-Frank Act § 1044(a), 124 Stat. at 2015.

208. *Id.* § 1002(12), 124 Stat. at 1957 (listing other "enumerated consumer laws" to which section 1041 conflict principles apply, including the Gramm-Leach-Bliley Act, Consumer Leasing Act, Fair Credit Reporting Act, and Home Ownership and Equity Protection Act).

the surety bond, the statute of limitations for actions against the bond run coextensively with those of the mortgage broker. Thus, it is necessary to determine whether TILA, RESPA, TFA, and ECOA contain provisions in express conflict with the MBPA's broker surety provision.

None of these statutes contain such an express provision. A state law is inconsistent with TILA only to the extent that it may require "a creditor to make disclosures or take actions that contradict the requirements of the Federal law."<sup>209</sup> The RESPA preempts inconsistent state laws with respect to mortgage settlement practices, but "then only to the extent of the inconsistency."<sup>210</sup> The TFA does not preempt state laws "that impose[] *more restrictive* intrastate requirements or regulations" than TFA.<sup>211</sup> Similar to RESPA and TILA, ECOA preempts only those state laws that are inconsistent with its specified provisions as applied to mortgage brokers.<sup>212</sup> With a focus only on substantive conflicts, these federal statutes do not seem to preclude enforcement of Washington's MBPA one-year mortgage surety statute of limitations provision.

In summary, no federal statute addresses mortgage broker surety liability. Before passage of SAFE, federal legislation did not even demand mortgage surety coverage. By extension, nor does any TILA, RESPA, TFA, or ECOA provision specifically prescribe statutes of limitations for bringing claims against the broker surety.<sup>213</sup> The TILA, RESPA, and ECOA preempt state law only to the extent it conflicts with substantive provisions of those statutes.<sup>214</sup>

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209. 12 C.F.R. § 226.28(a)(1) (2011). A state law contradicts TILA "if it requires the use of [a] term [required by TILA] to represent a different amount or a different meaning . . . , or if it requires the use of a term different from that required [in TILA] to describe the same item." *Id.* The commentary to Regulation Z states that "[g]enerally, State law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures, do not contradict the Federal requirements." 12 C.F.R. pt. 226 supp. I § 28(a)(3) (2011).

210. 12 U.S.C. § 2616 (2006); 24 C.F.R. § 3500.13(a) (2011).

211. 47 U.S.C. § 227(e) (2006 & Supp. IV 2010) (emphasis added) (placing restrictions on telephone solicitations).

212. 12 C.F.R. § 202.11(a) (2011). *See generally* Regulation B, 12 C.F.R. pt. 202.

213. Importantly, however, none of these federal statutes precludes actions against the mortgage broker's bond or surety. In fact, sureties are deemed "persons" subject to suit under each of these statutes. *See* 12 U.S.C. § 2602(5) (2006); 15 U.S.C. §§ 1602(d), 1604(a), 1691a(f) (2006 & Supp. IV 2010).

214. *See supra* notes 207-14, 212-19 and accompanying text.



*B. Washington's Mortgage Surety Bond Offers Only the Illusion of  
Consumer Protection and Stands as an Obstacle to Accomplishment of  
Congressional Objectives*

Dodd-Frank exempts state laws that provide greater consumer protections than federal law.<sup>215</sup> Even now, federalization of a surety bond requirement is one of three options available to states to ensure compliance with Dodd-Frank (the others being a net worth showing, or contribution to a state recovery fund). Furthermore, federal law does not require states to allow a consumer to recover against the bond. Consequently, it might be argued that by providing a mechanism for Washington consumers to recover against mortgage brokers, bonds provide greater assurances than, under federal law. As a result, Washington is free to impose whatever statutory limits it chooses.

A more compelling argument can nonetheless be made that Washington's one-year limitation provision stands as an impediment to the full purposes of federal consumer protection laws. With SAFE's expressed goals "to increase uniformity, reduce regulatory burden, enhance consumer protection, and reduce fraud,"<sup>216</sup> requiring consumers to bring claims in derogation of the statutes of limitations periods allowed by federal law violates the manifest congressional intent of SAFE and other vital consumer protection laws.<sup>217</sup>

Circling back to the opening hypothetical: should a consumer bringing suit on the mortgage broker's surety be foreclosed from a remedy simply because she brought her claim on day 366? Clearly, she would be in time for claims filed under TILA, RESPA, TFA, and ECOA.<sup>218</sup> Washington's mortgage broker surety statute of limitations provision thus works to abort the consumer's rights to prosecute her grievances within the time permitted by federal laws. Congress has acted to provide comprehensive consumer protections, federalize important mortgage broker conduct, and require mortgage brokers to obtain surety bonds.<sup>219</sup> Congress thus could not have intended to allow state statutes

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215. See Dodd-Frank Act, Pub. L. No. 111-203, § 1041(a)(2), 124 Stat. 1376, 2011 (2010) (to be codified at 12 U.S.C. § 5551) ("[A] statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title."); *id.* § 1041(c), 124 Stat. at 2011 (providing for rulings on preemption to be made by the Consumer Financial Protection Bureau); *see also* 12 U.S.C. § 2616 ("[No] law is inconsistent . . . [if] such law gives greater protection to the consumer."); 12 C.F.R. § 202.11(a) (2011) ("A state law is not inconsistent if it is more protective of an applicant.").

216. 12 U.S.C. § 5101 (Supp. IV 2010).

217. *See id.*

218. *See discussion supra* Part I.C.

219. Dodd-Frank Act § 1100, 124 Stat. 1376, 2105-07.

of limitations provisions to preempt federal causes of action under laws relevant to mortgage broker practices.

### CONCLUSION

There is simply no conceivable purpose to require a consumer to bring an action against the surety before she even knows a claim might exist against her mortgage broker. Washington's mortgage broker surety one-year statute of limitations effectively negates a host of other state and federal provisions established to maximize consumer protections. Given the complexity and document-intensive nature of mortgage transactions, timely discovery of any injury within a year is hardly assured. The "greater" protection Washington's mortgage surety provision purportedly gives, in fact, compels something worse: that a consumer risk judicial and even financial sanction for bringing a claim that might not exist. A consumer filing an action against the mortgage broker thus faces the nearly impossible task of enforcing her rights against the surety.

Costs of mortgage broker bonding and preventing a run on claims are insufficient justifications for the delimiting one-year provision. Washington's legislature should therefore amend and remove the surety bond statute of limitations provision of the MBPA, making it coextensive with limitations applicable to mortgage brokers. The only possible effect of making the mortgage surety statute of limitations coextensive with principal statutes of limitations would be a modest increase in bond costs and perhaps fewer insurers who would enter Washington's market to provide such coverage. In either event, the costs are not likely to present barriers to market entry, if no other reason than applicants have the option of presenting net worth affirmations or alternative forms of insurance as a licensing requisite. Barring action by the Washington Legislature, the Federal Reserve Board should make a determination that, to the extent the surety liability provision contravenes federal statutes of limitations incorporated into the MBPA, the provision is unconstitutional.

To be sure, recourse from a mortgage broker's surety bond will not make an aggrieved consumer whole. However, given the astounding crash in the mortgage industry, surety recourse may represent the last resort for a consumer. It is anomalous to require a consumer to act against the surety within one year, when statutes of limitations provisions for the principal parties are much longer. The one-year limitation flies in the face of the purpose and intent of mortgage broker statutes and established federal law, and the Washington Legislature should remove the provision.

